I agree with this contention on the authority of *Re Fischel & Mann*, (1919) 2 K.B. 431, at pp. 440 and 441, and *in re Palmer & Hosken*, (1896) 1 Q.B. 131—see pp. 136, 137; see also Russell on Arbitration, 11th edition p. 206.

I accordingly order that the award be set aside under section 12(2) of the Arbitration Ordinance and that the matter proceed to trial as an ordinary action.

Costs of this motion to abide the result of the action.

Order accordingly.

Solicitors for the plaintiff—*Hogan & Ivens.*

Solicitors for the First Defendant—

Presgrave & Matthews.

(Original Civil Jurisdiction)

Terrell, J.

February 10, 1933.

***RE* CHUA CHENG SUAN**

(Singapore Bankruptcy No. 54 of 1925)

Ordinance No.44 Section 113 (2)—Prosecution of offending Bankrupt.

A prosecution for offences against the Bankruptcy Ordinance will not be ordered under Section 113 (2) by a Judge if he is satisfied that the Official Assignee has properly exercised his judicial discretion in refusing the written consent required by Section 113 subsection (2).

An application was made by Motion by a creditor of the Bankrupt Chua Cheng Suan for an Order that the Bankrupt be prosecuted for an offence committed under Section 107(m) of Ordinance No. 44 (Bankruptcy). The Applicant alleged that the Bankrupt was adjudicated on the 6th March 1925 and that on the 9th July and 17th September 1929 the Bankrupt borrowed from the Applicant $660 on two promissory notes and had repaid him $52 to account of these two notes and that at the time the Bankrupt contracted these debts he did not disclose to the Applicant that he was an undischarged bankrupt.

The Applicant also produced evidence that he had applied to the Official Assignee for sanction to prosecute the Bankrupt for the offence punishable under Section 107(m) of Ordinance No. 44 (Bankruptcy) and that the Official Assignee had refused to give the written consent to sanction the prosecution required by S. 113 (2) of the Ordinance. Accordingly he applied to the Judge for an Order under Section 113 (2) above.

S. Fung for the Applicant submitted that he had produced prima facie evidence to show that an offence had been committed and that it was the duty of the Official Assignee to sanction the proceedings and that if he would not do so the Judge should make an Order directing prosecution.

Tudor (Assistant Official Assignee) did not oppose the application but drew the attention of the Court to the Official Assignee's reasons for not giving his written consent as required by that action. He stated that the Official Assignee had investigated the matter and as a result of such investigation had satisfied himself that there was no liklihood that the Bankrupt would be convicted of the alleged offence.

Terrell J. gave an oral judgment to the following effect:—

"It appears to me that all I am concerned to see is whether in refusing his written consent the Official Assignee is properly exercising the judicial discretion vested in him. If he has properly exercised such discretion I should decline to interfere with it In this case upon hearing the statements made by the Assistant Official Assigne I am of opinion that the Official Assignee has properly exercised his judicial discretion and therefore I refuse the motion".

Motion Dismissed.

Solicitor for the Applicant—*S. Fung.*

(Appellate Criminal Jurisdiction)

Deane, J.

August 22, 1927.

CHOP SUM THYE.....Appellants

vs.

REX.....Respondent

(Singapore Criminal Appeal No. 19 of 1927)

Pawnbroker—pawning of stolen property—conviction of thief and receiver—Magistrate's order—unconditional restitution—appeal—jurisdiction—"Criminal cause or matter"—Ordinance No. 61 (Pawnbrokers) S. 28 (1); Criminal Procedure Code, S. 295.

The Appellants, pawnbrokers, received in pawn certain diamonds which proved to be the very diamonds stated in a Police Circular to have been missing from a jeweller. The thief and receiver of the diamonds were arrested, tried and convicted of theft and dishonestly receiving stolen property respectively. After the conviction was recorded the prosecutor applied for the return of the diamonds. Counsel who watched those proceedings on behalf of appellants opposed the application. The Magistrate made an order for unconditional restitution. In an appeal against the order a preliminary objection was taken that there was no right of appeal from the order:—

Held, that there was a right of appeal under S. 295 of the Criminal Procedure Code.

The Queen vs. *The Justices of the Central Criminal Court*, 18 Q.B.D. 314 and *Leceister* v. *Cherryman*, (1907) 2 K.B. 101 considered.

Held, that the order of the Magistrate was within the jurisdiction of the Police Court and that the conviction was perfectly legal.

Held also, that the question of ownership of the diamonds could not be re-opened, the order being consequential upon the result of the trial of the thief and made upon the facts disclosed in the trial to which the appellants could not be a party.

Reg. v. *Goldsmith*, 12 Cox. C.C. 595 and *Rex.* v. *Macklin* 5 Cox. C.C. 216 applied.

APPEAL from an order made by Mudie, D. J. for the unconditional restitution to the owner of the diamonds stolen from him.

The material facts are set forth in the Judgment of Deane, J.

Campbell for the Appellants. The order does not affect civil rights. *Leceister* v. *Cherryman* (1907), 2 K. B. 101. Circumstances may require terms to be imposed. As to proof of ownership, we have had that between Buchenbolz and the pawnbroker. No evidence was adduced as between Buchenbolz and the pawnbroker as to identity of the articles. On question of the conduct of owner and the circumstances of the case see Attenborough on Pawnbrokers, p. 123 notes on Section 30 of Pawnbrokers Act, 1872 (35 & 36 Vict. C. 93). There was negligence on the part of the owner in interviewing three strange people and having a large quantity of diamonds on the table, which made it possible for the accused to suddenly grab several packets and by sleight of hand make off with one. He should only have one packet at a time. As to the circumstances, the offence has been brought home to the accused by the assistance of the pawnbroker, who gave every facility to police and complainant. There was nothing to put the pawnbroker on his guard, when he took them into pawn. Pawnbroker was innocent, but not he, who gave opportunity to the thief.

Reg. v. Justices of Central Court, 18 Q.B.D. 314. *Rex. v. Macklin* 5 C.C.C. 216. *King* v. *Elliot & ors.* (1908) 2 K.B. 452, *Rex* v. *Goldsmith*, 12 C.C.C. 594.

Battishill, for the complainant, in reply. As to proof of ownership, see Halsbury Vol. 22, p. 254. There is no authority for the contention that the ownership must be separately proved after conviction. The fact that the diamonds are stolen is *res judicata*. The pawnbroker is the pawnee of what are proved to be "Stolen goods". There is no contemplation of another trial as to the ownership of the goods. The matter could be dealt with summarily. The evidence shows that the owner took every precaution. It is difficult to see how they could have taken greater care. The pawnbroker did nothing to investigate the ownership of the diamonds, when pawned, beyond going to see where the pawnor's house was. Pawnbroker admits there is always a risk about the title. He does his business at a risk.

Cur. Ad. Vult.

Deane, J.—In this matter the Appellants a firm of pawnbrokers hereinafter called the pawnbroker have appealed against an order of unconditional restitution made by the Magistrate under Section 28 (1) (b) of the Pawnbrokers Ordinance No. 61.

It appears that certain diamonds were stolen from a diamond dealer by the name of Buchenholz. A man named Mohamed Mydin when arrested was found in possession of 10 diamonds, the pawntickets of Chop Sum Thye for 10 others all of which were identified by Buchenholz as the diamonds stolen from him. He was subsequently charged along with two other men for (1) Theft of diamonds (2) in the alternative dishonestly receiving the diamonds knowing that they were stolen. The case was heard, the person who received the goods in pledge from Mohamed Mydin being a witness and at the conclusion one of the men charged with him was convicted of theft while Mohamed Mydin was convicted of dishonestly receiving the diamonds knowing them to have been stolen. Mr. Battishill who appeared on behalf of the prosecutor then applied that the diamonds which had been recovered by the police from the pawnbroker and produced in evidence should be restored to the owner Mr. Campbell who had held a watching brief throughout the trial for the pawnbroker thereupon asked and obtained an adjournment to enable him to take the instructions of his client. When the matter came on again the Magistrate heard what he had to urge but ordered that the diamonds should be given back to Buchenholz.

Against that order the pawnbroker has now appealed.

A preliminary objection is taken that there is no right of appeal from the order.

And it becomes necessary therefore first to decide whether the appeal of the Pawnbroker should be heard.

Now it is trite law that there is no inherent right of appeal. Such right must always be given by statute and it is only if the Pawnbroker can bring himself within some statute which gives the right that he is entitled to appeal.

The Pawnbrokers Ordinance provides for no appeal and the Appellants therefore only have a right of appeal if they come within Section 295 of the Criminal Procedure Code.

That Section reads:

> "Except in the cases mentioned in Sections 289, 292 and 293 any person who is dissatisfied with any judgment, sentence or order pronounced by any District Court or Police Court in a criminal case or matter to which he is a party may prefer an appeal to the Supreme Court against such judgment, sentence or order for any error in law or fact by &c." (here follows the procedure adopted to bring the appeal before the Court).

In this case there can be no doubt on the authority of *The Queen v. The Justices of the Central Criminal Court*, 18 Q.B.D. page 314, that this was an order made "in a criminal cause or matter", it was pronounced in a Police Court and does not fall within any of the excepting sections; the only remaining point on which the Court has therefore to be satisfied is, was the Pawnbroker a party to the proceedings? Now the proceedings which have been sent on in this matter are under the caption *Rex* v. *Chop Sum Thye*. On the face of them Chop Sum Thye is a party; it is true that certain other proceedings have been attached to them by way of explanation of the circumstances under which the order came to be made, but those are in my opinion entirely different proceedings The Appellant does not claim to be a party to those proceedings, in fact he states in paragraph 7 (2) of his petition that he was

not a party to them and the only point to be really determined is whether he is a party in the proceedings *Rex* v. *Chop Sum Thye*.

It therefore seems to be necessary to enquire what is the substantial nature of these proceedings *Prima facie* as I have said the caption shews Chop Sum Thye is a party but that would not make the Pawnbroker a party if on close scrutiny it were found that he was really not a party. The proceedings are under Section 28 (1) (b) of the Pawnbrokers Ordinance; that Section provides that

> "If any person is convicted in any Court of feloniously taking or obtaining any goods and chattels and it appears to the Police or other Court that the same have been pawned with any pawnbroker, the Court, on proof of the ownership of the goods and chattels, may if it thinks fit, order the delivery thereof to the owner, either on payment to the pawnbroker of the amount of the loan or any part thereof, or without payment thereof or any part thereof, as to the Court according to the conduct of the owner and the other circumstances of the case, seems just and fitting".

Now it is to be remarked that in this Section not one word is said about hearing the pawnbroker before making the order; to use the words of Lord Esher M. R. in *Queen* v. *Justices of Central Criminal Court* (18 Q.B.D.) "This power is given to the judge or Court which tries the criminal, and it seems that the order can, and what is more, ought to be, made practically at the time of the trial. I do not say it must be made at the minute, but it must be made as one of the conclusions of the trial". What is contemplated in fact is an order consequential upon the result of the trial; the thief has been convicted and therefore as a natural consequence the goods which he has stolen are ordered to be returned to the owner. But it is argued that is all very well when there are only two people, the thief and the owner, before the Court: here you have a third party with rights and surely the Court could not make an order without first hearing the pawnbroker. But this contention is answered effectively in the very case I have just referred to. In that case an order was made for restitution not of the stolen property but of the proceeds of the property upon agents of the convicted thief who held without any notice of the fraud. Lord Esher in his judgment points out that the goods having been obtained by false pretences an order was made "not on a stranger but on the agents of the convicted criminal; that is, that it was an order for the restoration of the proceeds in the hands of the agents which was the same as though they had been in the hands of the offender himself". And what is the title of a pawnbroker? He holds by bailment and therefore his position cannot in law be better than that of his bailor. When therefore it has been shown that his bailor's title is through theft, and the thief has actually been convicted there is nothing more to be said and no need to hear the pawnbroker, he has no title; and the Court can with a perfectly clear conscience proceed to order the return of the goods without hearing him in person since he has in fact been heard through his bailor The only rights then left to the pawnbroker are his rights against the bailor and these of course the Court does not interfere with in any way; his rights over the property which were conferred upon him by the bailor are taken away since it has been proved to the Court that the bailor had none to give. A great deal had been said by Mr. Campbell to the effect that the Criminal Court ought not, when there is a dispute, to take away the rights of the pawnbroker but should leave the matter to be fought out in a Civil Court but I cannot myself see that this would be of any advantage to the pawnbroker since as soon as it was proved in the Civil Court that a person had been convicted of stealing the same goods which had been pawned with the pawnbroker, the owner of the goods would be entitled to a return of the goods or damages with costs and the only result would be to involve the pawnbroker in unnecessary expense. (Vide the case of *Leicester* v. *Cherryman* (1907) 2 K.B. page 101. In this case the Magistrate who heard the case must have been satisfied that the goods were stolen since he convicted a man of stealing them and also the man who received them and passed them on to the pawnbroker. Clearly then it was proved in this case that the bailor had no right in the goods and the pawnbroker the bailee necessarily could not get from him what he had not. As he had therefore no rights over the goods the Magistrate would have been quite entitled following the wording of the Section to have ordered the return of the goods without hearing the pawnbroker, and in that case he would clearly not have been a party to these proceedings. He has however actually been heard and the question is, does that constitute him a party so as to give him right to appeal under the Criminal Procedure Code. It is clear under Section 28 (2) he would have the right to appeal since he would have been summoned and dealt with for an offence punishable by fine exceeding $25/-. Has he the same right of appeal under Section 28 (1) when the order is in fact not directed to him at all, but is to the police who have produced the property in evidence in the Court and where there is no fine or sanction of any kind attached to the order which could affect him? His position it seems to me is almost but not quite comparable with that of a man who intervenes as *amicus curiae*, not quite, I think because under the Section he has got some interest in the kind of order made, the Magistrate may attach to the order of restitution conditions favourable to him. I think therefore that on the strict construction of Section 295 of the Criminal Procedure Code there is a right of appeal and that he should be heard.

It follows however also I think that the only question on which he can appeal is whether the Magistrate has exercised his discretionary power properly or not under the section. He cannot from the nature of the case have a right to ask that the whole question

of the guilt or innocence of the thief should be reopened. Since with regard to the order convicting the thief he is not a party and therefore has no right of appeal. The order as has been said is consequential on the result of the trial; to what extent that is so is apparent from the case of *Rex* v. *Macklin*, 5 Cox's Criminal Cases 216. In that case when prisoners charged with larceny of goods pleaded guilty on the indictment and an application was made for restitution the Court after argument consented to hear pawnbrokers who were in possession of the goods and against whom the order would operate but Baron Alderson merely on perusal of the depositions and on an affidavit being filed identifying the goods as the property of the prosecutor ordered restitution. The affidavit was of course necessary in the particular circumstances of the case where there were a large number of the goods and the pawnbroker contended that some of them did not belong to the prosecutor and there having been no trial the Court was not in a position in the absence of an affidavit to pronounce on the ownership of the goods, but the Court satisfied itself merely on perusal of the depositions that there had been a felony committed. The arguments of counsel for the pawnbrokers in that case bear a peculiar resemblance to the arguments in this case and are therefore peculiarly noteworthy as are also the remarks of the learned judge. Parry for the pawnbrokers submitted 'there would be great injustice 'if the order was made. There was a very large amount 'of property in the hands of the pawnbrokers and 'because the prisoner had pleaded guilty, they were to 'be deprived in this summary manner of what, upon 'investigation, it might appear they were legally entitled 'to. The act of the prisoner in pleading guilty ought 'not to affect third parties. It might be that he was 'guilty upon one charge and knowing that he must be 'convicted might hope to do himself service with the 'prosecutor by confessing his guilt as to all. There 'was no proof that the property ever belonged to the 'prosecutor, but merely because he chose to include it 'in several indictments he came to the Court and asked 'the Judges without further enquiry to order it to be 'given to him.' Alderson, B.—"No doubt the identity of the property must be established, but I do not think we have any other matter to consider."

The learned Baron therefore in the circumstances of that case was satisfied upon reading the deposition that a felony had been committed; he was satisfied by the confession of the thief that he was the thief; he only required it to be substantiated by affidavit that the goods were in fact the property of the prosecutor and he made the order for restitution. Again in *Rex.* v. *Goldsmith* (12 Cox C.C. 595) the Deputy Recorder who stated that he had consulted Baron Bramwell held that the Court is bound by the statute to order restitution of the property obtained by false pretences and the subject of the prosecution in whosoever's hands it is found. If the case is read it will be found that the only question admitted to discussion was whether the order of restitution could extend to other articles than those identified at the trial and the Court held it could not, but as to those identified at the trial no discussion was allowed and the order went as a matter of course. Giffard who appeared for the persons interested said distinctly "I am not contending that assuming there has been proof before you that an article has been obtained by false pretences it is protected from operation of the order by reason of its afterwards having been unlawfully received, but I contend that as a condition precedent to the execution of that order it must have been proved before you that the particular articles were obtained by false pretences".

Now substitute in this case for false pretences theft and we have the position exactly under which the Magistrate can exercise jurisdiction under the section. As soon as it was proved to the satisfaction of the Magistrate that the particular diamonds which were before him and which had been pawned by the Receiver were the same diamonds which had been stolen and were the property of the prosecutor all the conditions necessary to making the order was fulfilled. Clearly all these things were proved in the trial since the Magistrate convicted, and there was no need, indeed no procedure for having them proved a second time since the order is made as a consequence of the verdict in the other case.

The reasons for appeal therefore do not seem to me in view of these considerations and principles to be well founded.

They are 1. The conviction upon which the order proceeded was made in proceedings which were illegal because of misjoinders of charges and trial.

2. The ownership of the diamonds in question was not proved as against the applicants or as required by Ordinance No. 61 (Pawnbrokers) Section 28 or in any proceeding to which the applicants were party.

3. The conduct of the owner and other circumstances of the case were not investigated in any proceedings to which the applicants were party.

4. The evidence before the Court was not sufficient to support a finding that the diamonds pawned with the applicants were part of the diamonds alleged to have been stolen by Mohamed bin Alwa.

As to No. 1 the answer is that the order of the Court was within the jurisdiction of the Court. It is clear that the Court has jurisdiction to try the thief and the Receiver together if the theft and the receiving form substantially one transaction. Upon the face of it therefore the conviction is a legal conviction made by a competent Court, in full force and effect and from which there has been no appeal The only persons who can appeal are the convicts and they have not done so. They of course might have raised this point had they appeared but they have not done so, and certainly the pawnbroker cannot raise it for them. So far as

the pawnbroker is concerned all that this Court is bound to do is to see that in making the order which concerns him and against which he has appealed the Police Court was within its powers. Of that there can be no doubt and this point therefore fails.

Reasons 2 and 3 which complain that the ownership of the diamonds and the conduct of the owner were not investigated in any proceedings to which the applicants were party are not good reasons as I have already pointed out because the law does not require and indeed there is no provision for holding such a separate enquiry, the order being consequential upon the result of the trial of the thief and made upon the facts disclosed in the trial to which *ex necessitate rerum* the pawnbroker could not be a party.

Reason 4 that the evidence before the Court was not sufficient to support a finding that the diamonds pawned with the applicants were part of the diamonds is on a par with reason.

1. To allow it to be used by the pawnbroker would in fact be equivalent to allowing him when he is not a party to the proceedings against the thief to appeal in those proceedings.

For these reasons I think that this appeal should be dismissed.

Appeal Dismissed

Solicitors for the Appellants—*John G. Campbell & Co.*

Solicitors for the Owner—*Sisson & Delay.*

(Appellate Criminal Jurisdiction)

Murison C. J., Whitley and Terrell JJ.

December 19, 1932.

LAM FONG TZE.....Appellant

vs.

REX.....Respondent

(Singapore Magistrate's Appeal No. 58 of 1932)

Pawnbrokers—Magistrate's order—return of pawned property—strict proof of ownership and of unlawful pawning—Ordinance No. 61 (Pawnbrokers) Ss. 28-41.

Before a magistrate makes an order for the return of pawned property alleged to have been stolen he must have strict proof of ownership and of unlawful pawning.

The appellant was convicted on 16th November 1932 before A. C. Boyd Esq., Police Magistrate, Singapore, on a charge that he being the proprietor of Chop Wing Shin, on or about the 24th day of October 1932, at Singapore, did fail to give information at the nearest police station of possession of a gold wristlet watch after receiving a circular describing the said Wristlet watch and thereby committed an offence punishable under section 41(2) of Ordinance No. 61 (Pawnbrokers).

The accused was fined $50 or 1 month R. I.

When the case was called before the Magistrate, the accused (appellant) admitted the fact of possession of the watch described in a police circular issued under Section 41(1) and that the Circular was served upon him on 30th March 1932, that the watch in question was taken in pawn on 12th October 1932 and was found in his possession on 24th October 1932 and that he made no report.

Accused was convicted of a similar offence in March 1932.

The Magistrate after passing sentence as stated made the following order—"Watch to owner free of charge."

Campbell for Appellant. Pawns can only be dealt with under Ordinance No. 61 (Pawnbrokers). Power of Court laid down in Section 28. Court can act only on conviction for unlawful pawning under Section 31, conviction for theft or fraudulently obtaining goods or on it appearing in any proceedings before it that goods have been unlawfully pawned and proof of ownership. No conviction. No evidence of unlawful pawning and no proof of ownership.

Mc Elwaine, K. C. (Deputy Public Prosecutor.) Proof should have been given of ownership, theft and unlawful pawning.

Murison C. J. delivered the Judgment of the Court.

Murison, C. J.—"The appellant in this case was convicted under Ordinance 61 (Pawnbrokers) with having failed to comply with a circular requiring information as to certain property in his possession. On his conviction there was an order for the return of the property to the owner. The property in question was a watch.

The first ground of appeal concerns the question whether the words used by the appellant at the trial amounted to a plea of guilty. The record says 'Admit facts.' He said that he had a watch which answered the description in the circular but he also said that he had other watches of the same number as that given in the circular. Personally, I think that amounts to a plea of guilty, since he was bound to report possession of the watch in any case; nor does it matter that he had other watches with the same number. In my opinion there was a plea of guilty and the appeal, therefore, fails on that point.

The second ground of appeal is that the facts disclosed are not proof that the watch was unlawfully pawned. That may be so. I do not want to say much about that, but I will pass on to the third ground of appeal as to there being no proof of the ownership of the watch in question.